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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY

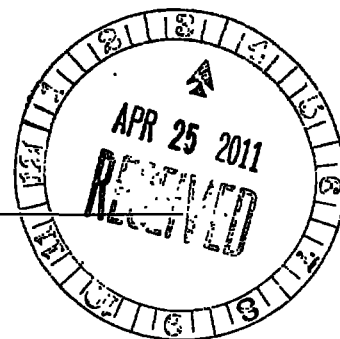
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42125



**ENTERED  
Office of Proceedings**

APR 25 2011

Part of  
Public Record

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY IN OPPOSITION TO  
MOTION TO COMPEL OF E.I. DUPONT DE NEMOURS & COMPANY**

A motion to compel will not be granted unless the moving party can “demonstrate a real, practical need for the information” requested. *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at 2 (Nov. 24, 2010) (“TPP”); *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985) (“Guidelines”). The Motion to Compel (“Motion”) filed by Complainant E.I. du Pont de Nemours & Company (“DuPont”) does not mention this standard – let alone try to meet it. This failure is understandable, because it is hard to imagine how DuPont could argue with a straight face that it has a “real, practical need” for its unprecedented requests for any document created over the last six years that relates to Defendant Norfolk Southern Railway Company’s (“NS’s”) subjective “disposition” towards toxic-by-inhalation (“TIH”) and hazardous materials traffic. DuPont’s strained attempt to relate its discovery requests to qualitative market dominance (for even DuPont must admit that these requests are irrelevant to stand alone cost evidence) is predicated on a fundamental misunderstanding of that jurisdictional requirement. DuPont’s burden to prove qualitative market dominance in this case depends upon the objective existence of “effective competition from other rail carriers or modes of transportation,” 49 U.S.C. § 10707(a) – in other words, whether carriers *other than the defendant*

could provide alternative transportation for the issue movements. The subjective “disposition” or “desires” of the defendant regarding the issue commodities is utterly irrelevant to the § 10707(a) inquiry. DuPont’s curiosity about how NS feels about its common carrier obligation to transport TIH and hazardous materials plainly does not constitute a “real, practical need” for the intrusive and burdensome discovery it demands, and the Motion should be denied.

## **I. BACKGROUND**

DuPont has now posed over 900 discovery requests (including subparts), in response to which NS personnel are spending thousands of person-hours to identify and produce responsive materials that NS anticipates will amount to hundreds of gigabytes of data. Many of these requests ask for information in NS’s possession related to qualitative market dominance – for example, several requests in DuPont’s First Set of Discovery Requests asked NS to produce any documents related to “actual or potential competition to NS from other rail carriers or transportation modes” for the issue movements or other movements of the issue commodities. *See* Defendant’s Responses and Objections to Complainant’s First Set of Discovery Requests, at 31-32, 51 (served Jan. 19, 2011) (attached as Ex. 1). NS has not objected to discovery requests that seek information about potential competitive alternatives from other rail carriers or other modes of transportation, and NS is searching for and will produce any documents that it uncovers responsive to these requests.<sup>1</sup>

After posing this initial set of discovery requests related to qualitative market dominance – and after receiving NS’s responses indicating that it would search for and produce responsive

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<sup>1</sup> By contrast, DuPont has acknowledged that it has identified over 100 boxes of documents that may contain information related to DuPont’s use of alternatives to NS’s rail transportation, but DuPont has refused to search those boxes for responsive documents. DuPont’s refusal to produce documents related to its use of alternative transportation has forced NS to file a motion to compel production of those documents. *See* Motion to Compel, *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, STB Docket No. 42125 (filed April 20, 2011).

documents – DuPont served a Second Set of Discovery Requests. Requests for Production 167 and 168 of DuPont’s Second Set of Discovery Requests asked NS to produce all documents created since 2005 that address NS’s “willingness and desire” to transport TIH or hazardous materials and any decisions to “discourage” such transportation or to not compete for such transportation. NS objected and refused to answer on the grounds that “[t]he requested documents have no relevance to any issue in this case” and therefore the request that NS search through six years of records to identify irrelevant documents about its “willingness and desire” to transport hazardous commodities was overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. *See* NS Responses to RFPs 167 and 168 (DuPont Motion Ex. A). DuPont responded with a letter in which it claimed (with little explanation) that its requests were relevant to market dominance because NS’s subjective desire to transport hazardous materials would affect whether it chose to compete with transportation alternatives for those shipments. *See* J. Moreno Letter to P. Hemmersbaugh at 2 (Apr. 5, 2011) (attached as Ex. 2). NS responded by reminding DuPont that NS was responding to other market-dominance-related requests and that whether NS “desires” to transport any particular traffic has nothing to do with whether it is market dominant under § 10707(a). *See* P. Hemmersbaugh Letter to J. Moreno at 1 (Apr. 8, 2011) (attached as Ex. 3). DuPont responded by filing the instant Motion.

## **II. DUPONT MISSTATES THE LEGAL STANDARD FOR MOTIONS TO COMPEL.**

In the first place, DuPont’s claimed summary of “The Legal Standard for Motions to Compel” – a summary that does not cite a single decision on a motion to compel in a SAC case – is slanted and incomplete. According to DuPont, the Board’s legal standard consists of little more than allowing complainants in rate cases “broad discovery rights” for anything that is

“relevant.” Mot. at 3-4. On the contrary, recent Board decisions have made clear that a party’s “right to discovery . . . has limits.” *CF Indus., Inc. v. Kaneb Pipe Line Partners, L.P.*, STB Docket No. 42084 (Nov. 23, 2004); *see TPI*, STB Docket No. 42121, at 2 (Nov. 24, 2010); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. 42123, at 2 (Nov. 24, 2010). General assertions or speculation that requested information might be relevant are not sufficient: “the Board requires ‘more than a minimal showing of potential relevancy’ before granting a motion to compel discovery.” *TPI v. CSXT*, STB Docket No. 42121, at 2 (Nov. 24, 2010) (quoting *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 292 (1997)). Rather, a party seeking to compel discovery is required to “demonstrate a real, practical need for the information” it has requested. *Id.* (citing *Guidelines*, 1 I.C.C.2d at 548 (1985)). Moreover, “discovery also may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co.*, STB Docket No. AB-124 (Sub-No. 2) (Nov. 14, 2003).<sup>2</sup>

The test that DuPont must meet, therefore, is not whether it can conjure some attenuated link between the documents it requests and some theory of potential relevance. It rather must demonstrate both that it needs the documents it requests and that those documents have a “likely value” that outweighs any undue burden to NS in searching for and producing them. DuPont’s Motion falls far short of this standard.

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<sup>2</sup> Since DuPont claims support from “the policies reflected in the Federal Rules of Civil Procedure,” (Motion at 3) it is worth noting that, like the Board’s rules, the Federal Rules of Civil Procedure “will not permit unlimited discovery” and do not give litigants “a license to engage in an unwieldy, burdensome, and speculative fishing expedition.” *Murphy v. Deloitte & Touche Group Ins. Plan*, 619 F.3d 1151, 1163 (10th Cir. 2010).

### **III. A RAILROAD'S SUBJECTIVE "DISPOSITION" TOWARD TRAFFIC IS IRRELEVANT TO MARKET DOMINANCE.**

DuPont's claim that documents related to NS's subjective "disposition" towards TIH and hazardous materials could be relevant to market dominance depends upon a tenuous multi-step chain of reasoning that ignores the objective statutory standard of § 10707(a), ignores Board decisions rejecting claims that a carrier's disposition toward traffic was evidence of market dominance, and is generally unsound in its reasoning.

In the first place, DuPont's desire to probe NS's subjective "disposition" toward hazardous materials and TIH materials is plainly irrelevant to the statutory test of qualitative market dominance. Section 10707(a) sets up an objective standard for market dominance – whether effective competition exists. The question is not whether the railroad subjectively *thinks* there is an effective competitive alternative (or whether the shipper thinks it has competitive options) – the question is whether there *is* effective competition. Put differently, a railroad cannot create a lack of market dominance by subjectively believing in the efficacy of a transportation alternative that could not work in the real world, and a shipper cannot manufacture market dominance by subjectively claiming that rail is its only alternative.

But even if a carrier's subjective "disposition" and "desires" could be relevant under § 10707(a), the logical chain DuPont attempts to draw between qualitative market dominance and NS's "disposition" toward hazardous materials breaks down in several places. It is simply not true that competition can only exist if a railroad "fear[s] losing business to its competitors." Mot. at 3. The § 10707(a) question is whether the railroads' competitors are capable of providing an effective *alternative* to the railroad's service – not whether the railroad is

sufficiently enthusiastic about keeping the business.<sup>3</sup> Whether or not a railroad “desires” to transport TIHs or has an “aversion” to that traffic has nothing to do with whether other carriers or modes can compete for that transportation.

Indeed, a participant in a competitive market might be quite willing to cede business to its competitors in order to focus its marketing attention elsewhere. Consider a movement from a chemicals plant served by a barge dock and a rail terminal to another chemicals plant similarly served by barge and rail. Whether that rail carrier “fears” competition from barges or subjectively “desires” to transport the issue traffic would have nothing to do with the objective question of whether barges are an effective competitive alternative to that railroad’s service.

This is not a hypothetical example. As DuPont knows full well, the Board has already held that a railroad’s stated aversion to transporting a commodity does not create market dominance where there is an effective competitive alternative to rail service. *See E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42100 (June 30, 2008). In *DuPont*, the defendant railroad informed the Board that it had an explicit pricing policy of de-marketing chlorine because of the extraordinary risks and public safety issues associated with chlorine transportation. *Id.* at 5. DuPont claimed that this chlorine pricing policy proved that CSXT was market dominant over a lane of chlorine traffic that was also served by barges, arguing that because “CSXT would prefer to lose chlorine traffic to alternative modes” CSXT’s rail transportation must not have been subject to effective competition. Complainant’s Rebuttal Evidence at 13-14, *DuPont v. CSXT*, STB Docket No. 42100 (filed Apr. 4, 2008). The Board

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<sup>3</sup> *See, e.g., FMC Wyoming Corp. v. Union Pac. R.R. Co.*, 4 S.T.B. 699, 711 (“we must now consider whether . . . [there are] transportation *alternatives* that provide effective competition) (emphasis added); *Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, 6 S.T.B. 573, 582 (2003) (“examine whether there are any effective transportation *alternatives*”) (emphasis added).

firmly rejected DuPont's argument, holding that CSXT's policy toward chlorine traffic was irrelevant to market dominance and that the barge alternative to CSXT's rail service constituted effective competition under § 10707(a). *See DuPont v. CSXT*, STB Docket No. 42100, at 5-6 (June 30, 2008).

If an explicit carrier policy to discourage chlorine movements did not affect the market dominance analysis in *DuPont v. CSXT*, then surely no argument DuPont could make about alleged NS "willingness" or "desire" to carry TIH or hazmat traffic possibly could affect the market dominance analysis here. In short, DuPont's argument that the subjective attitude of a defendant railroad toward transporting highly hazardous traffic is relevant to market dominance is thoroughly at odds with the objective standard of § 10707(a), the controlling holding of *DuPont v. CSXT*, and the simple logical fact that the subjective "disposition" of a railroad toward traffic is completely unrelated to whether it has a competitor for that traffic.

#### **IV. NS HONORS ITS COMMON CARRIER OBLIGATION.**

DuPont spends much of its motion speculating that NS has an "aversion" to TIH traffic and may secretly want to "discourage" TIH traffic despite its common carrier obligation. Motion at 4-5. This red herring can be disposed of quickly. NS has a common carrier obligation to transport TIH and hazardous materials, and it fully honors that legal obligation. DuPont has not alleged otherwise. Pursuant to that obligation, NS is legally required to quote rates and provide rail service for TIH and hazardous commodities, regardless of its "disposition" toward that traffic.

DuPont appears to believe that NS's compliance with its common carrier obligation is not sufficient, and that the enthusiasm with which NS carries out that obligation for highly dangerous commodities is somehow relevant to this litigation. DuPont points to a quote in 2006 congressional testimony in which NS's CEO stated that NS likely would not choose to transport

highly hazardous materials if it were not legally required to do so. Motion at 4-5. DuPont's apparent belief that there is something unusual or improper about this statement is baffling. In a hypothetical legal regime where railroads could choose to refuse requests for service, no rational cost-benefit analysis could support a business decision to willingly transport commodities so dangerous that the rupture of a single car could threaten thousands of lives and billions of dollars in liability. The fact that NS's CEO stated the obvious fact that a railroad would not willingly accept the potential gargantuan liability from transporting TIH materials – in the context of a hearing designed to find better ways to allocate the risk inherent in transporting such commodities<sup>4</sup> – is utterly irrelevant to whether NS faces effective competition from another mode of transportation for any one of the challenged movements.

**V. DUPONT'S CLAIMS THAT NS'S OBJECTIONS ARE "IMPROPER" ARE MERITLESS.**

Finally, DuPont claims that NS's objections "should be deemed waived" because NS allegedly did not sufficiently state the rationale for its objections in its initial written responses. Motion at 5. This is nonsense. The rationale for NS's objections was and is perfectly clear – DuPont RFPs 167 and 168 call for information that "ha[s] no relevance to any issue in this case," and as such those discovery requests are overbroad; requiring NS to respond to them would be unduly burdensome; and the requests are not reasonably calculated to lead to the discovery of admissible evidence.<sup>5</sup> See NS Responses to DuPont RFPs 167-68. The fact that DuPont devotes

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<sup>4</sup> See *Current Issues in Rail Transportation of Hazardous Materials: Hrg. Before the Subcomm. on Railroads of the House Comm. on Transp. & Infrastructure*, 109th Cong., at 1 (June 13, 2006) (statement of Subcomm. Chairman LaTourette) (hearing was intended to "explore new ways of handling the risk exposure for highly hazardous commodities").

<sup>5</sup> DuPont is unable to cite any Board rule for the proposition that objections to discovery are waived if a party's initial written responses do not sufficiently detail their rationale. Instead, DuPont cites a provision of the Federal Rules of Civil Procedure for this proposition – a provision that does not have any analogue in the Board's discovery rules and that does not say



the bulk of its motion to an attempted argument that its requests are relevant to market dominance amply demonstrates that DuPont understands the reasons for NS's objections quite well. To the extent DuPont believes that NS is required to do more to "reveal the nature" of the burden from searching for and producing irrelevant material, that undue burden can be stated simply. DuPont would have NS produce "all documents" – every memo, every email, every report – created at any time since 2005 that relate to NS's subjective "disposition" toward TIH materials and hazmats. Responding to these requests likely would require extensive and costly database searches, email searches, and document review – all to reveal documents that have no relevance to whether or not there are effective alternatives to NS's rail service for the challenged movements.<sup>6</sup> An expensive and time-consuming search for documents not relevant to any issue the Board will be deciding in this litigation is the quintessential "undue burden."

\* \* \*

NS's objections to DuPont RFPs 167 and 168 are not only "proper," they are well-grounded in the statute and Board precedent. How NS "feels" about transportation of TIH commodities, hazardous materials, or any other commodity has no relationship to whether another carrier or mode could provide effective alternative transportation for one or more of the lanes in DuPont's complaint. *See DuPont v. CSXT*, STB Docket No. 42100 (June 30, 2008). DuPont has fallen far short of its burden to "demonstrate a real, practical need for the

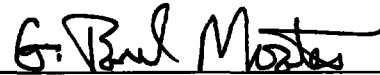
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anything about whether insufficiently detailed objections are "deemed [to be] waived." Motion at 5 & n.16 (citing Fed. R. Civ. Proc. 34(b)(2)(B)).

<sup>6</sup> DuPont's claim that the documents it seeks must be admissible because they are "business records" is ludicrous. *See* Mot. at 6. Documents must be *relevant* to be admissible – the fact that a document might fall under a hearsay exception of the Federal Rules of Evidence does not make it relevant in a Board proceeding (or in any other proceeding). *Cf.* Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

information" it has requested, *TPI*, STB Docket No. 42121, at 2 (Nov. 24, 2010), and the Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. Paul Moates", is written over a horizontal line.

G. Paul Moates  
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*Counsel to Norfolk Southern Railway Company.*

Dated: April 25, 2011

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of April, 2011, I caused a copy of Norfolk Southern Railway Company's foregoing Reply in Opposition to Motion to Compel of E.I. du Pont de Nemours & Company to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno  
Sandra L. Brown  
Jason Tutrone  
Thompson Hine LLP  
1920 N Street, NW, Suite 800  
Washington, DC 20036



Eva Mozena Brandon



# EXHIBIT 1

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**E.I. DUPONT DE NEMOURS AND COMPANY**

**Complainant**

**v.**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**Defendant**

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**Docket No. NOR 42125**

**DEFENDANT'S RESPONSES AND OBJECTIONS TO  
COMPLAINANT'S FIRST SET OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Norfolk Southern Railway Company ("NS"), through undersigned counsel, responds as follows to Complainant E.I. DuPont de Nemours and Company's ("DuPont's") First Set of Discovery Requests (the "Discovery Requests").

**GENERAL OBJECTIONS**

NS's General Objections, as set forth herein, are to be considered objections to each of the specific interrogatories and document requests (including subparts) that follow. NS's objections shall not waive or prejudice any objections that it may later assert.

1. NS objects to the gargantuan number and immense scope of DuPont's discovery requests, which are vastly overbroad, unduly burdensome, and grossly unreasonable. DuPont has posed 841 separate discovery requests including subparts. This broad and extensive discovery is far more oppressive and extensive than necessary for DuPont to develop evidence in this case. Indeed, DuPont's discovery requests are peppered with demands for materials that have little or no conceivable relevance to the subject matter of this case – such as demanding that NS produce "working copies" of seventeen different computer models. DuPont's failure to limit

discovery in a Stand Alone Cost case. Moreover, the “profitability of NS’s traffic” and “profitability of transportation service provided by NS for the account of DuPont” are not relevant to whether the Challenged Rates are reasonable under the stand-alone cost constraint. NS further objects to this Request as overbroad and unduly burdensome in that it is not limited to a reasonable scope of time and instead seeks information since 2003.

### **REQUEST FOR PRODUCTION NO. 3**

For each DuPont Shipment, either individually or aggregated in any form with other NS movements, produce all documents, including but not limited to any studies or other analyses, that refer or relate to actual or potential competition to NS from other rail carriers or transportation modes, or to transportation alternatives that are or might be available to DuPont for such movements.

#### **Response:**

NS specifically objects to the request for the production of “any studies, analyses or other documents” on the ground it is overbroad and unduly burdensome. NS also objects to this Request to the extent it calls for information protected by the work product doctrine. NS further objects to this Request as overbroad and unduly burdensome in that it is not time-limited. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

### **REQUEST FOR PRODUCTION NO. 4**

For each of the commodities identified in Exhibits A and B (Parts 1-3) to DuPont’s Verified Complaint, either individually or aggregated in any form with other commodities, produce all documents, including but not limited to any studies or other analyses, that refer or relate to actual or potential competition to NS from other rail carriers or transportation modes for the transportation of such commodities, or to transportation alternatives that are or might be available for the movement of such commodities by rail.

#### **Response:**

NS incorporates by reference its response to Request for Production No. 3.

#### **REQUEST FOR PRODUCTION NO. 5**

Produce all documents, including but not limited to any studies or other analyses, that refer or relate to actual or potential competition to NS from other rail carriers or transportation modes for transportation for the account of DuPont, or to transportation alternatives that are or might be available to DuPont for any of the DuPont Shipments, either individually or aggregated in any form with other NS movements or other commodities.

#### **Response:**

NS incorporates by reference its response to Request for Production No. 3.

#### **REQUEST FOR PRODUCTION NO. 6**

For each DuPont Shipment, either individually or aggregated in any form with other NS movements, produce all documents, including but not limited to any studies or other analyses, that refer or relate to: (a) the price that would or might be charged by other carriers or modes of transportation for transportation from Origin to Destination; and (b) the cost(s) that would or might be incurred by other carriers or modes of transportation for the transportation from Origin to Destination.

#### **Response:**

NS incorporates by reference its response to Request for Production No. 3.

#### **REQUEST FOR PRODUCTION NO. 7**

For each of the commodities identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, either individually or aggregated in any form with other commodities, produce all documents, including but not limited to any studies or other analyses, that refer or relate to: (a) the price that would or might be charged by other carriers or modes of transportation for the transportation of such commodities; and, (b) the cost(s) that would or might be incurred by other carriers or modes of transportation for the transportation of such commodities.

#### **Response:**

NS specifically objects to the request for the production of "any studies, analyses or other documents" on the ground it is overbroad and unduly burdensome. Many negotiations with NS customers may involve representations from those customers that purport to compare NS rates to those of its competitors; such negotiation tactics are not relevant to any issue in this litigation. NS also objects to this Request to the extent it calls for information protected by the work



product doctrine. NS further objects to this Request as overbroad and unduly burdensome in that it is not time-limited. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

#### **REQUEST FOR PRODUCTION NO. 8**

For each of the commodities identified in Exhibits A and B (Parts 1-3) to DuPont's Verified Complaint, either individually or aggregated in any form with other commodities, produce all documents, including but not limited to any studies or other analyses, that refer or relate to the physical characteristics of such commodities and the effect of those physical characteristics on the ability to transport such commodities via modes other than rail.

##### **Response:**

NS incorporates by reference its response to Request for Production No. 3.

#### **REQUEST FOR PRODUCTION NO. 9**

Produce all documents created, reviewed or referred to by NS, from January 1, 2006 through the present, to assess the market for transportation of each DuPont Shipment and to set rates on each DuPont Shipment, including but not limited to any competitive alternatives to NS rail transportation.

##### **Response:**

NS specifically objects to this Request because it is not reasonably calculated to lead to the discovery of admissible evidence. The question in this proceeding is whether the rates NS has established for the transportation at issue exceed a maximum reasonable level under a stand-alone cost analysis under the Constrained Market Pricing principles established in *Coal Rate Guidelines*, 1 I.C.C.2d 520 (1985). The process by which a railroad sets its rates has no relevance in a SAC analysis. Here, therefore, how NS "assess[ed] the market for transportation" is not relevant. NS also objects to the request for "all documents created, reviewed or referred to

- a. Geographic location, *i.e.*, city, county and state;
- b. Railroad location, *i.e.*, railroad station name, SPLC, and milepost;
- c. Railroad mine identification number corresponding to the identification numbers contained in NS' computerized traffic data, *e.g.*, SPLC, FSAC or any other numbering system NS uses;
- d. Annual tonnages that NS transported from that mine;
- e. Track capacity in feet at each location separated between track owned by NS and track not owned by NS;
- f. The track configuration at each mine, with both the track that NS or another rail carrier owns (or jointly owns) and the mine-owned track clearly identified;
- g. Annual weeks of mine operation;
- h. Average tons per car loaded;
- i. Loading capacity (tons per hour); and
- j. If the mine has closed or ceased shipping coal, the date of such closure or of the last shipment.

**Response:**

NS objects to this Request to the extent that it requires NS to perform a special study by developing, compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS further objects to this Request as overbroad and unduly burdensome. Subject to and without waiving these objections and the General Objections, NS refers DuPont to the publicly available documents available on its website at <http://www.nscorp.com/nscportal/nscorp/Customers/Coal/Mine%20Operations/> and responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

**REQUEST FOR PRODUCTION NO. 38**

Please produce any studies, simulations, analyses and other documents in NS' possession from January 1, 2003 to present analyzing or related to the transportation of shipments to Destinations from Origins (a) by a rail carrier other than NS, and (b) by any mode of transportation other than rail. If no such documents exist, please confirm the same in the response to this Request.

**Response:**

NS specifically objects to the request for the production of "any studies, analyses or other documents" on the grounds it is overbroad and unduly burdensome. NS also objects to this

Request to the extent it calls for information protected by the attorney-client privilege and/or work product doctrine. NS further objects to this Request as overbroad and unduly burdensome in that it is not limited to a reasonable scope of time and instead seeks information since 2003. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

**REQUEST FOR PRODUCTION NO. 39**

Please produce the following documents (in a computer-readable format to the extent available)

- a. Documents that show the rail line elevation and provide all information maintained by NS pertaining to those elevations including, but not limited to, division, subdivision, beginning milepost, ending milepost and elevation in feet above sea level for all NS line segments in the SARR states.
- b. Documents that identify all curves on the NS line segments in the SARR states and provide all information maintained by NS pertaining to those curves including, but not limited to, division, subdivision, beginning milepost, ending milepost and degree of curvature.

**Response:**

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS further objects to the overbroad and unduly burdensome request for “all” information “pertaining to” elevations and “all” information about “all” curves. NS responds that it does not maintain the elevation data requested in subsection a. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession related to the curve data sought in subsection b, to the extent that they exist and can be located in a reasonable search.

Respectfully submitted,

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/s/ Noah A. Clements  
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*Counsel to Norfolk Southern Railway Company*

Dated: January 19, 2011

# EXHIBIT 2

April 5, 2011

*By E-Mail and First Class Mail*

Paul Hemmersbaugh  
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**RE: E.I. du Pont de Nemours and Company v. Norfolk Southern Railway  
Company, STB Docket No. 42125**

Dear Paul:

I am writing in regard to "Defendant's Responses and Objections To Complainant's Second Set of Discovery Requests," served by Norfolk Southern Railway Company ("NS") on E.I. du Pont de Nemours and Company ("DuPont") on April 4, 2011. DuPont has posed two Request to which NS has completely objected. Those Requests are:

**REQUEST FOR PRODUCTION NO. 167**

Please produce all documents, from 2005 to the present, that (a) address the willingness and desire of NS to transport TIH commodities and/or any Issue Commodity that is a TIH; (b) constitute, refer or relate to internal policies or decisions to discourage transportation of TIH commodities on NS; and (c) refer or relate to decisions by NS whether or not to compete to with other modes or rail carriers to transport TIH commodities.

**REQUEST FOR PRODUCTION NO. 168**

Please produce all documents, from 2005 to the present, that (a) address the willingness and desire of NS to transport hazardous materials, other than TIH commodities; (b) constitute, refer or relate to internal policies or decisions to discourage transportation of hazardous materials, other than TIH commodities, on NS; and (c) refer or relate to decisions by NS whether or not to compete with other modes or rail carriers to transport hazardous materials, other than TIH commodities.

NS has interposed the following objections to both Requests:

NS objects to this Request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The requested documents have no relevance to any issue in this case. NS has a

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common carrier obligation to transport [TIH commodities / hazardous materials], and its "willingness and desire" to do so are irrelevant and have nothing whatsoever to do with a Stand Alone Cost case.

DuPont contends that these Requests are highly relevant to the market dominance issues in this proceeding. The common carrier obligation of NS to handle TIH commodities and hazardous materials is a matter completely separate from its "willingness and desire" to transport such commodities. "Willingness and desire" are indicative of whether NS competes to transport such commodities when such competition does exist. The common carrier obligation means only that NS must transport these commodities "upon reasonable request," not that it will compete to obtain such business. Furthermore, the phrase "willingness and desire" appears only in subpart (a) of DuPont's Requests. NS has not stated a clear basis for objecting to subparts (b) and (c), which also pertain to market dominance.

In light of the above explanation of the relevance of these Requests, DuPont asks that NS reconsider its objections and respond to both Requests. Alternatively, if NS is willing to formally "Admit," pursuant to 49 C.F.R. 1114.27, that it possesses market dominance over the transportation of all TIH commodities and hazardous materials at issue in this proceeding, DuPont will agree to withdraw these Requests. DuPont requests your response within three days.

Sincerely,



Jeffrey O. Moreno

# EXHIBIT 3



April 8, 2011

By Courier

Jeffrey O. Moreno  
Thompson Hine LLP  
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Washington, D.C. 20036

Re: E.I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co., STB Docket  
No. NOR 42125

Dear Jeff:

We write in response to your letter concerning DuPont RFP Nos. 167-168. *See* J. Moreno Letter to P. Hemmersbaugh dated April 5, 2011. As you know, NS has agreed to search for documents responsive to DuPont RFPs 3 through 8 concerning competition for the transportation of the issue traffic, and to produce relevant and responsive documents found in that search. *See* Defendant's Responses and Objections to Complainant's First Set of Discovery Requests at 30-33.

The documents sought by DuPont's additional discovery requests, concerning NS's "willingness or desire" to transport TIH commodities, or "whether or not to compete with other modes or rail carriers" are not relevant to matters at issue in the above-referenced maximum rate reasonableness case. Whether or not NS "desires" to transport any particular traffic is not relevant to whether it has market dominance over the transportation of that traffic. Nor does it have any relevance to SAC issues. Accordingly, NS reiterates its objections DuPont RFPs 167-68, and does not intend to search for responsive information.

Very truly yours,

  
Paul A. Hemmersbaugh